United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

TABLE OF CONTENTS

	Page
Issues For Review	1
Statement of the Case	2
Facts	3
Section 1: The lower Court's finding of liability was unsupported by the record and refuted by the affidavits and evidence accepted and considered by the Court on Curtis' motions under Rules 52 and 59 FRCP.	6
Point I. The Court below confused and misapplied the principles for determining liability herein.	6
Point II. Scienter is the proper standard to be applied herein.	9
Point III. Under the negligence standard the Court applied the wrong test of materiality.	11
Point IV. The omitted fact was not material.	12
Point V. Section 14(a) only protects against omissions affecting investment decisions.	14

Contents

	Page
Point VI. The Court's finding that Gruss exercised reasonable care is unsupported by the record.	16
Point VII. Neither the proxy material nor the SEC use the term "holder" in an ambiguous fashion.	18
Point VIII. Gruss was the only dissenter who improperly executed the written objection.	21
Section 2: The valuation of $188,400 found by the Court below is grossly excessive and unsupported by the record.	22
Point IX. The Court's valuation of $188,400 was not determined in accordance with the valuation requirements of Pennsylvania law.	22
Point X. The valuation of $188,400 is not supported by the record.	27
Point XI. The fair value of Gruss' stock on September 13, 1972 was $18,840. . .	37
Conclusion	45

Contents

Page

TABLE OF CITATIONS

Cases Cited:

Austin v. City Stores Co. (No. 1), 89 Pa. D.&C. 57 (1953) 23, 37

Chris-Craft Industries, Inc. v. Piper Aircraft Corp., 480 F.2d 341 (2d Cir. 1973) 6, 7, 8

Electronic Specialty Co. v. International Controls Corp., 409 F.2d 937 (2d Cir. 1969) 15

Francis I. duPont & Co. v. Universal City Studios, Inc., 312 A.2d 344 (Del. Ch. 1973) 41

Gerstle v. Gamble-Skogmo, Inc., 478 F.2d 1281 (2d Cir. 1973) 9, 11, 12

In re Watt & Shand, 452 Pa. 287, 304 A.2d 694 (1973) . . 23, 25, 26, 27, 37, 38, 40

Lanza v. Drexel & Company, 1973 CCH Fed. Sec. L. Rep., Par. 93959 7

Lowry v. General Waterworks Corp., 26 Pa. D.&C. 2d 154 (1961) . . 23, 37, 40

Contents

Page

Mills v. Electric Auto Light Co., 396 U.S. 375 (1970) 11

Schlick v. Penn-Dixie Cement Corp., 507 F.2d 374 (2d Cir. 1974) 7, 8, 11

SEC v. Manor Nursing Ctrs., Inc., 458 F.2d 1082 (2d Cir. 1972) 7

SEC v. Texas Gulf Sulphur Co., 401 F.2d 833 (2d Cir. 1968) 15

Sparkill Realty Corporation v. State, 268 N.Y. 192 (1935) 39, 40

<u>Statutes Cited:</u>

Securities Exchange Act of 1934, 48 Stat. 881:

15 U.S.C. §78, et. seq.:
Sec. 14(a), 15 U.S.C. §78n(a) 2, 14

<u>Rules Cited:</u>

Securities and Exchange Commission Rules:

17 C.F.R. §200 et. seq.:
Rule 14a-9, 17 C.F.R. §240.14a-9 . . 1, 2, 9

Contents

Page

Schedule 14A, 17 C.F.R. §240.14a-101 . 1, 2

Reg. §240.13d-4 19

Reg. §240.14a-3, Sub-par. 12(d) 20

Federal Rules of Civil Procedure:

Rule 52 . . . . 6, 8

Rule 59 . . . . 6, 8

Other Authorities Cited:

Pennsylvania Business Corporation Law:

§515 . . . . 22, 27

§515(B) 22

§515(F) 22

§810 22

Valuation of Dissenter's Stock, 79 Harv. L. Rev. 1468-69 (1966) 23

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

- x

OSCAR GRUSS,

Plaintiff-Appellee,

and

OSCAR GRUSS & SON,

Plaintiff,

-against-

THE CURTIS PUBLISHING COMPANY,

Defendant-Appellant.

- x

BRIEF FOR DEFENDANT-APPELLANT

ISSUES FOR REVIEW

1. Did the Court below apply the appropriate principles of law in determining liability, under Rules 14(a)-9a and 101 of the Securities Exchange Act of 1934, for the omission of a material fact from a proxy statement?

2. Did the weight of the evidence support a finding that the omission of a Pennsylvania statutory definition of the term "holder" as only a record holder constituted the omission of a material fact under the aforementioned Exchange Act of 1934?

3. Did the Court below properly apply the principles mandated under Pennsylvania law in arriving at its measure of damages?

4. Did the weight of the evidence support the opinion as to valuation made by plaintiff's expert witness and adopted by the Court below?

5. Did the weight of the evidence support the opinion as to valuation made by defendant's expert witness and rejected by the Court below?

STATEMENT OF THE CASE

This is an action brought by the record owner (Gruss & Son) and beneficial owner (Gruss) of preferred stock of a Pennsylvania corporation (Curtis) under §14(a) and 27 of the Securities Exchange Act of 1934, Regulation 14a-9 and Item 2 of Schedule 14A of the Rules and Regulations thereunder, and §515 and §810 of the Pennsylvania Business Corporation Law. The action involves the rejection by Curtis of a written objection executed by Gruss in an effort to exercise the right of appraisal under the Pennsylvania statute. After a non-jury trial, the lower Court held that the appraisal right had been improperly exercised due to a material omission in the proxy statement in violation of Rules 14(a)-9a and 101 under the 1934 Act, and assessed damages against Curtis in excess of $200,000. A motion thereupon made by Curtis for relief under Rules 52 and 59 FRCP was denied in all respects by a Memorandum

and Order containing Supplemental Findings and Conclusions. Curtis now appeals from the original and Supplemental Findings and Conclusions, embracing the trial transcript as well as affidavits accepted and considered upon the above-mentioned motion.

FACTS

In late July or early August of 1972, Curtis issued proxy material respecting a vote to be held on September 14, 1972 on a recapitalization of the company, pursuant to which the two classes of Curtis' preferred stock, as well as its common stock, would be converted into a new common stock in accordance with a stated formula. The proxy material was received by Oscar Gruss & Son (Gruss & Son), a stock brokerage house located in New York City, which held some 12,560 shares of the $4 Prior Preferred Stock of Curtis as record holder for appellee Oscar Gruss (Gruss), the beneficial owner and one of its general partners. In late August, Gruss & Son executed and delivered to Curtis a proxy voting in favor of the recapitalization plan. On September 12, 1972, two days before the voting date, Gruss apparently made a determination to vote against the plan of recapitalization and to file a written objection in order to exercise the statutory appraisal right. The task of preparing the necessary documents for execution was left to Julius Anreder, the Director of Re-

ition of "shareholder" is one of twenty-eight definitions set forth in this section of the Pennsylvania statute, including terms such as "written", "shares", "share certificate" and "business corporation"). The Court went on to assess damages of $188,400 plus interest and appraisal costs, basing its assessment on a valuation of $15 per share, in spite of the fact that the record contains undisputed evidence that the net asset value (346a, 321a) on the valuation date was negative, and that the market value as of that date was substantially less than $5 per share (220a, 322a).

This brief is divided into two main sections; Section 1, contending that the Court below erred in finding a violation of Rules 14(a)-9a and 101, and Section 2, contending that the damages assessed by the Court below were grossly excessive and unsupported by the record.

SECTION I

THE LOWER COURT'S FINDING OF LIABILITY WAS UNSUPPORTED BY THE RECORD AND REFUTED BY THE AFFIDAVITS AND EVIDENCE ACCEPTED AND CONSIDERED BY THE COURT ON CURTIS' MOTIONS UNDER RULES 52 AND 59 FRCP.

POINT I

THE COURT BELOW CONFUSED AND MISAPPLIED THE PRINCIPLES FOR DETERMINING LIABILITY HEREIN.

The law has developed two standards for imposing liability for false and misleading or omitted material facts under the Securities Exchange Act of 1934; to wit, the standards of scienter and negligence. The Court below confused and misapplied these standards.

The Second Circuit, in Chris-Craft Industries, Inc. v. Piper Aircraft Corp., 480 F.2d 341 (1973) outlined the requisite elements of proof to establish civil liability for failure to disclose information under the scienter standard. The Court held that a finding of liability should be premised on the establishment of materiality and culpability. Materiality is discussed in Points III, IV and V of this brief in connection with the negligence standard. With respect to culpability, in order to find liability it would be necessary to establish

either (1) that defendant knew that material facts were stated or omitted and that such statement or omission would mislead the shareholder, or (2) that defendant failed or refused to ascertain facts when they were available to him or could have been discovered by him with reasonable effort, evincing a wilful and reckless disregard for the truth.

> "[T]he function of what has been called the 'scienter' requirement is to confine the imposition of liability to those whose conduct has been sufficiently culpable to justify the penalty sought to be exacted. The initial inquiry in each case is what duty of disclosure the law should impose upon the persons being sued .... In making this determination we should bear in mind that a major congressional policy behind the Securities Laws in general, and the anti-fraud provisions in particular, is the protection of investors who rely upon the completeness and accuracy of the information made available to them. A knowing or reckless failure to discharge these obligations constitutes sufficiently culpable conduct to justify a judgment under Rule 10(b)-5 or 14(e) for damages...." Chris-Craft Industries, Inc. v. Piper Air-Craft Corp., supra; see also Lanza v. Drexel & Company, 1973 CCH Fed. Sec. L. Rep., Par. 93959; SEC v. Manor Nursing Ctrs., Inc. 458 F.2d 1082 (2d Cir. 1972).

It would appear from the Findings and Conclusions of the lower Court that this standard of scienter was applied herein, not only generally from the language of the opinion, but specifically from the Court's citing of Schlick v. Penn-Dixie Cement

Corp., 507 F.2d 374 (2d Cir. 1974) and Chris-Craft Industries, Inc. v. Piper Aircraft Corp., supra, as the basis of its finding (267a, 268a). If that be the case, the Court's finding must be reversed because there has been a total failure of proof as to the elements of culpability. There is not a scintilla of testimony or evidence in the record to the effect that Curtis knew that material facts were omitted or that such omission would mislead the shareholder. Furthermore, a finding of culpability is specifically refuted by the affidavit of Howard Taylor considered by the Court upon Curtis' motions under Rules 52 and 59 FRCP (303a). In that affidavit, Mr. Taylor, a member of the Philadelphia law firm which prepared the proxy material, states that the section pertaining to appraisal rights "is identical to the articulation used in other proxy statements, and is substantially identical to articulations of those rights generally used on other occasions by Morgan, Lewis & Bockius and other Pennsylvania law firms and lawyers" (304a). Prior to the institution of this action, Mr. Taylor had on no occasion seen an appraisal rights paragraph prepared by his firm or any other Pennsylvania law firm which "expressly states that the appraisal rights had to be exercised by the record holder, as opposed to the beneficial owner" (304a). Mr. Taylor goes on to state that, to his knowledge, no claim had previously been made or question raised in

Pennsylvania, prior to the institution of this action, relating to the exercise of appraisal rights by a record holder as opposed to a beneficial owner (304a). In light of this undisputed fact situation, the Court below had to have been in error if it were applying the scienter standard and finding culpability on the part of this defendant.

POINT II

SCIENTER IS THE PROPER STANDARD TO BE APPLIED HEREIN.

Contrary to its initial citation of scienter cases, as previously described, the lower Court in its Supplemental Findings (312a) stated that it imposed liability under the doctrine of negligence and not scienter, citing Gerstle v. Gamble-Skogmo, Inc., 478 F.2d, 1281 (2d Cir. 1973). The Gerstle decision, however, does not require a negligence standard in §14a actions, even though it is frequently cited for that proposition. Instead, the Court specifically permits the application of the scienter standard, stating "...this does not mean that scienter should never be required in an action under Rule 14a-9 ...." 478 F.2d, p. 1300. The case at hand involves the omission of information set forth in a statute, available to all parties, dealing specifically with a procedural step as opposed to a

substantive investment decision. The omitted fact was not in the nature of information only in the possession of a corporate defendant, to which a plaintiff shareholder could never have access. Accordingly, it would seem that a more severe test should be applied to hold a defendant liable for failing to set forth such information in its proxy material. This fact situation should be one to which the scienter standard should be applied. After all, if a corporation fails to disclose a fact peculiarly in its possession which would be important to a shareholder in arriving at his investment decision, that shareholder would have no means of ascertaining the information elsewhere. In such a situation, the corporation should be held liable whether its failure to disclose was wilful, reckless or merely negligent. In our fact situation, where the omitted fact had no bearing upon the shareholders' investment decision and was available to the shareholder exclusive of the corporation, it would be inequitable to hold the corporation liable unless its actions were found to be intentional, wilful or reckless.

POINT III

UNDER THE NEGLIGENCE STANDARD, THE COURT APPLIED THE WRONG TEST OF MATERIALITY.

If the standard applied by the Court below was indeed negligence and not scienter, as it stated in its Supplemental Findings, the Court erred in the test of materiality which it used. The proper test of materiality in a negligence situation is stated in Mills v. Electric Auto Light Co., 396 U.S. 375 (1970), being a "significant propensity" to effect the decision making process. The test was enunciated for the Second Circuit in Gerstle v. Gamble-Skogmo, Inc., supra, where the Court stated:

> "...the very fact that negligence suffices to invoke liability argues for a realistic standard of materiality. Justice Harlan's next sentence in Mills, that the defect must 'have a significant propensity to affect the voting process', 396 U.S. 384, 90 S.Ct. at 621 (emphasis in original), comes closer to the right flavor. While the difference between 'might' and 'would' may seem gossamer, the former is too suggestive of mere possibility, however unlikely. When account is taken of the heavy damages that may be imposed, a standard tending toward probability rather than toward mere possibility is more appropriate". p. 1302.

Instead of applying the "would" test as required in the Second Circuit, the Court below applied the "might" test, as enunciated under the scienter standard in Schlick v. Penn Dixie Cement Corp., supra. The Court found that the omitted fact was

material "... in the sense that a reasonable investor might have considered ...." it important in making his decision (267a, 268a) (emphasis added). Based upon the Gerstle decision, the Court clearly applied the wrong standard of materiality.

POINT IV

THE OMITTED FACT WAS NOT MATERIAL.

The Court's error in applying the wrong test of materiality, as set forth in Point III above, could well have been crucial to the finding of liability in this case. The fact situation with which we are dealing is unique in the sense that the probabilities and possibilities of shareholders being misled are capable of objective testing. All of the cases relating to this type of disclosure have involved facts which might have or would have been used by shareholders in making their investment decisions. They consisted of facts which specifically related to the corporations involved, such as inconsistencies in financial statements, conflicts or unfavorable background information as to potential directors, and other like information. In this case, however, the omission had nothing whatsoever to do directly with Curtis or any of its officers or directors. The fact involved was a statutory definition in the Pennsylvania Business Corporation Law which applied not just to Curtis, but to all Pennsylvania

corporations. The materiality and misleading nature of the omitted fact can be objectively tested because, as is set forth in the affidavit of Howard Taylor considered by the Court on Curtis' motion (303a), that very same fact has been omitted from the standard paragraph on appraisal rights used by Mr. Taylor's firm and other Pennsylvania law firms. Mr. Taylor has never seen the omitted fact included in <u>any</u> such paragraph and, most important, he has never come across a claim by a shareholder of any Pennsylvania corporation involving the omission. Accordingly, based upon the literally thousands of Pennsylvania shareholders who have correctly exercised appraisal rights over the years, it would be impossible to find a <u>probability</u> of this omission misleading a reasonable investor. Thus, under the appropriate <u>probability</u> test of materiality pursuant to the negligence standard, no liability could be imposed upon Curtis.

As a further test of the question of whether a shareholder would reasonably have been misled by the language of the statute as set forth in the proxy material, Curtis' counsel has made a survey of the corporation laws of the fifty States. Of the forty-two States that define the term "holder" or "shareholder" in their corporate statutes, thirty-eight specifically restrict the definition to a holder of record, and one permits the corporation to treat only the registered owner as the shareholder.

Not one State precludes the record owner from exercising the appraisal right, and only three States even permit the beneficial owner to do so. Under these circumstances, on what basis could the Court have held that the reasonable investor even <u>might</u> have been misled, much less <u>would</u> have been misled? This is an especially pertinent question where the Court bears in mind the fact that record holders for beneficial owners are normally sophisticated professionals, such as Gruss & Son, the record holder in this case. Therefore, the "reasonable investor" could not be considered a naive layman.

<u>POINT V</u>

<u>SECTION 14(a) ONLY PROTECTS AGAINST OMISSIONS AFFECTING INVESTMENT DECISIONS.</u>

As stated in Point IV, research reveals that questions of materiality have arisen only when measuring the shareholders ability to make an "investment decision", (i.e., buy, sell or retain the stock in question). No case was found where information pertaining to a procedural step required of a shareholder was either misstated or omitted. Consequently, the development of the legal principles associated with material misstatements giving rise to liability have been limited to situations where the facts were significant to a reasonable investor in arriving

at his decision of whether or not to invest or whether to vote for or against. The Court in SEC v. Texas Gulf Sulphur Co., 401 F.2d 833 at 849 (2d Cir. 1968) stated as follows:

> "Material facts include not only information disclosing the earnings and distributions of the company but also those facts which affect the probable future of the company and those which may affect the desire of the investors to buy, sell or hold company securities".

The decisional history with respect to material misstatements circumscribes the protection offered by law and quite clearly warns the issuers that they will be held liable where misstatements or omissions of fact affect the investors' judgment in making an investment decision. This limitation appears to be explainable in part because (1) legal procedural steps (i.e. buy and sell orders and proxies) are traditionally executed by the stock brokers (record holders) who are commonly acknowledged to be the procedural experts in the securities industry; and (2) legal procedures are statutory and a matter of public record, and are therefore not susceptible to misstatements or omissions.

It is of significance to note that materiality has been measured in the nature of a contest between parties having conflicting interests. Electronic Specialty Co. v. International Controls Corp., 409 F.2d 937 (2d Cir. 1969). The object of the Securities Law was to provide maximum disclosure by corporations

in adversary relationships with shareholders by equalizing the access to information. The conflict existing in the within case involved the question of recapitalization, not the exercise of appraisal rights. While a presumption may be drawn of a conflict between the corporation and its shareholder where a decision is to be made directly affecting each in different ways, no such presumption is justified in the case of the exercise of a right of appraisal. No evidence was ever adduced by plaintiff to indicate or even raise an inference that defendant intended to thwart the rights of a dissenting shareholder.

POINT VI

THE COURT'S FINDING THAT GRUSS EXERCISED REASONABLE CARE IS UNSUPPORTED BY THE RECORD.

Supplemental Finding No. 5 of the lower Court states that "plaintiffs and their agent Anreder exercised reasonable care and were not guilty of contributory negligence" (313a). An examination of the facts establishes that this finding and conclusion is totally unsupported by the record.

Julius Anreder testified (87a) that proxy material received by Gruss & Son was normally sent to the firm's proxy department which did whatever was necessary. On this occasion, however, Gruss chose to deal with the material in a different fashion.

Instead of following the customary procedure of having the proxy and written objection prepared by the proxy department, Gruss and Anreder tried to handle it themselves. The result was an error on Anreder's part in exercising the written objection. It is submitted that, had the material been dealt with in the normal and customary manner, the proxy department would have properly prepared the objection for signature. This statement can be supported by the affidavit of Harry L. Schroeder (293a) submitted and considered by the Court on Curtis' motion under Rules 52 and 59 FRCP. That affidavit and the exhibits attached thereto indicate that the proxy departments of the two other brokerage houses that submitted objections as record holders on behalf of beneficial owners did so correctly (296a-300a). The Court below has charged Curtis with responsibility for this error, which would not have occurred had Gruss not handled the material in this unusual manner. If an outside beneficial owner had indicated a desire to exercise the appraisal right, what would Gruss & Son have done? Would they have turned the material over to Anreder, their Director of Research, to take care of? Would Anreder have attempted to exercise these rights without having consulted anyone? It must be borne in mind that Anreder, at the time he prepared the written objection, was physically situated in a brokerage house which had a proxy depart-

ment and other experts available instantaneously. Yet, he chose to plunge ahead alone to incorrectly prepare a document which involved many thousands of dollars. Therefore, even accepting the lower Court's application of the standard of negligence to this action, how could Curtis be charged with foreseeing that a professional brokerage house as a nominee holder, would permit appraisal rights to be exercised in this manner? What connection can there possibly be and where is the proximate cause between the language or omission in the appraisal rights section of the proxy material, and the manner in which Gruss handled it?

POINT VII

NEITHER THE PROXY MATERIAL NOR THE SEC USE THE TERM "HOLDER" IN AN AMBIGUOUS FASHION.

In ninety-four (94) pages of proxy solicitation material containing literally hundreds of usages of the word "holder" or variations thereof, the lower Court found only two examples to support its statement that there is "conflicting usage" of the word "holder" in such materials (266a). One example given by the Court is completely incorrect. The reference to "holders" of fractional shares (329a) does, in fact, mean record holders. The proceeds of any sale of fractional shares would clearly have

to be paid to such record holders. It would then be up to them to distribute such proceeds to beneficial owners. As far as the reference to "holders" in the "Tax Consequences" section of the proxy material is concerned (329a), at best such ambiguity is questionable. Under the Internal Revenue Code, the record holder of property would be the party to whom the IRS would look for tax liability. That liability could be transferred to a beneficial owner only through submission of acceptable proof of such beneficial ownership. Therefore, it would not be entirely correct to assume that the reference to "holders" in this portion of the proxy material is an example which the Court below could consider in making its determinations. Furthermore, we submit that it would be grossly unfair to impose a huge financial burden on Curtis based on such a questionable theory.

It is also submitted that the term "holder" is not utilized by the SEC in an ambiguous fashion as stated by the lower Court, but on the contrary quite clearly used to refer to the record owner. §240.13d-4 cited by the Court as an example of ambiguity (267a) actually demonstrates a consistency in the use of the term. The section discusses the acquisition of securities by a "security holder", who prior to such acquisition was a beneficial owner. This clearly establishes that the SEC recognized that there was a distinction between the status of a

security holder and of a beneficial owner. Otherwise, it would obviously not have established the rule in this section. The SEC is consistent in their use of the term "holder" and "security holder", and always qualifies the phrase when referring to beneficial owners.

Reg. §240.14a-3, Sub-par. 12(d) was amended effective December 20, 1974, so as to require an issuer to make inquiry and supply to brokers holding their securities as record holders sufficient copies for distribution to beneficial owners. No such obligation existed in 1972 with respect to issuers, whereas at such time brokers were charged with this responsibility.

In view of the SEC regulations heretofore discussed, can Curtis be considered to have breached a duty to a beneficial owner where the SEC in the summer of 1972 (a) did not confuse the term "holder", and (b) did not recognize the need to provide rules requiring that a beneficial owner be directly furnished by the issuer with proxy information?

To summarize this point, contrary to the assertions of the Court below, both the SEC and Curtis, with one possible technical exception, have consistently used the phrase "holder" and its variants to mean the record holder of securities. When one adds to these facts the near-unanimous definition of the term under State statutes and the fact that no other Pennsylvania share-

holder has ever made a similar claim, it is wholly contrary to the weight of the evidence and to the law for the lower Court to find that Gruss and Anreder, experienced professionals in the securities business, would reasonably have been misled by this phrase.

POINT VIII

GRUSS WAS THE ONLY DISSENTER WHO IMPROPERLY EXECUTED THE WRITTEN OBJECTION.

The affidavit of Harry L. Schroeder (293a) establishes that, in addition to Gruss & Son, thirteen other shareholders filed written objections to the plan. Every one of them correctly and properly prepared and executed the written objection, including two brokerage houses (Merrill, Lynch, Pierce, Fenner & Smith Inc. and DuPont, Glore, Forgan Inc.) filing as record holders for beneficial owners. There was no question or confusion of any nature concerning the proper party to execute the objections. Yet the lower Court, in its Findings and Conclusions, held that a reasonable investor might have been misled by the alleged omission (267a, 268a). The only investor who made a mistake was Gruss. Under such circumstances, it is submitted that a reasonable investor <u>might not be</u>, <u>would not be</u>, and <u>was not</u> in any way confused or misled by the so-called omission.

SECTION 2

THE VALUATION OF $188,400 FOUND BY THE COURT BELOW IS GROSSLY EXCESSIVE AND UNSUPPORTED BY THE RECORD.

POINT IX

THE COURT'S VALUATION OF $188,400 WAS NOT DETERMINED IN ACCORDANCE WITH THE VALUATION REQUIREMENTS OF PENNSYLVANIA LAW.

Assuming arguendo that Gruss was entitled to the rights of a dissenting shareholder under Section 810 of the Pennsylvania Business Corporation Law, the lower Court's award of $188,400 or $15 per share for his 12,560 shares of Curtis' $4 Dividend Series Prior Preferred Stock ("Preferred Stock") must be reversed because it was not determined in accordance with the valuation requirements of Pennsylvania law.

Section 515(B) of the Pennsylvania Business Corporation Law provides that a dissenting shareholder is entitled to "the fair value of his shares as of the day prior to the date on which the vote was taken without regard to any depreciation or appreciation thereof in consequence of the plan ..." (407a). If the parties cannot agree on fair value, Section 515(F) establishes the mechanics of an appraisal proceeding (408a).

In applying Section 515, the Pennsylvania Supreme Court

has made it clear that the object of an appraisal proceeding is to determine the value of the dissenter's shares on a "going concern basis" and not on the basis of liquidation or dissolution. In re Watt & Shand, 452 Pa. 287, 291, 304 A.2d 694, 698 (1973). While the factors which must be considered in such a determination are many, Pennsylvania Courts have consolidated them into three principal methods of valuation which are generally used in combination; (1) net asset value; (2) actual market value; and (3) investment value. Id. at 292, 304 A.2d at 698. See Lowry v. General Waterworks Corp., 26 Pa. D. & C. 2d 154, 161 (1961); Austin v. City Stores Co. (No. 1), 89 Pa. D. & C. 57 (1953). Since each of these methods serves a particular purpose, the relative weight assigned to any of them in a given appraisal will vary depending upon the type of business involved and the special circumstances surrounding the particular company. See Valuation of Dissenter's Stock, 79 Harv. L. Rev. 1468-69 (1966).

The Court below adopted these three methods of valuation in its decision (280a). However, instead of basing its findings upon a weighted average thereof, it chose to disregard entirely the first two methods and rely solely upon investment value. Even then, its determination was premised upon

speculation about the future of Curtis' business; namely, that Curtis would be able to continue in business until at least October 1, 1986, at which time $7,485,000 of principal [1] and approximately $8,981,000 of interest[2] on its 6% Subordinated Income Debentures Due 1986 (the "debentures") would become due and enforceable. At or prior to this time, the Court stated that Curtis either would have to liquidate or would have to develop some alternative to liquidation. Assuming liquidation in 1986, the Court took the $65 per share redemption price of the Preferred Stock, added accrued dividends of $69.75, and

---

1 The Court in its opinion indicated that the principal amount of the debentures was $6,455,000 rather than $7,485,000. This $1,030,000 error probably resulted from Curtis' obligation to repurchase $1,030,000 of debentures from Mr. SerVaas upon the effectiveness of the plan of recapitalization (333a, 334a). Since the appraisal of Gruss' stock must be made without regard to the recapitalization plan, and since Mr. SerVaas owned $1,030,000 face amount of debentures on September 13, 1972, $7,485,000 was the principal amount of the debentures for the purposes of valuing Curtis' Preferred Stock.

2 This assumes that no interest payments are made before October 1, 1986 and would be reduced by the amount of any interest payments which are so made. It does not include interest upon the delinquent interest.

discounted the $134.75 total by a factor of 6% per year for a discounted present value at the end of 1972 of $63.18. The Court then reduced this figure by 75% to $15.80 per share after estimating that Curtis had only a 25% likelihood of survival and full payment. Since this figure was very close to the $15 per share valuation expressed by Gruss' expert witness Anreder, the Court concluded that it was justified in adopting the Anreder appraisal.

In making the foregoing valuation analysis, the Court erred in two significant respects. First, it valued Gruss' stock on the basis of a 1986 hypothetical liquidation, a method clearly impermissible under Section 515 of the Pennsylvania Business Corporation Law and the cases previously cited. The Court itself rejected this hypothetical approach respecting Anreder's testimony (274a), and also recognized that appraisal could not be made on a liquidation basis. And second, contrary to the specific holding of In re Watt & Shand, supra, it gave no consideration either to Curtis' net asset value on September 13, 1972 or to the actual market value of its Preferred Stock during 1972. Also, although investment value normally relates to earning capacity and involves the capitalization of a representative annual earnings figure, In re Watt & Shand,

supra at 293 n. 7, 304 A.2d at 698 n.7, the Court did not even discuss this matter. Instead, it evaluated certain intangibles such as management, the possible revival of The Saturday Evening Post, the testimony of Curtis' expert witness Shinagel that Curtis' common stock was worth $1,000,000[3] and the existence of certain mineral royalty rights, and from this concluded that Curtis could remain "in business at least until October 1, 1986". Once the Court reached the conclusion that Curtis had sufficient investment value measured by these intangibles to exist until 1986, it was able to avoid making a mathematical determination of Curtis' investment value on September 13, 1972 because its fair value analysis was instead based on a 1986 hypothetical liquidation and did not involve Curtis' investment value on that date.

---

3 The Court in its opinion stated that since Mr. Shinagel attributed a value of $1,000,000 to Curtis' common stock prior to recapitalization, a fortiori its Preferred Stock must have had value. However, a close reading of the trial transcript shows that Mr. Shinagel's opinion that the equity was worth $1,000,000 referred to both the common stock and the Preferred Stock. For example, on direct examination Mr. Shinagel testified that "[t]aking a million dollars for the equity, I attributed one quarter of that to the common shareholders and three-quarters to the preferred shareholders ...." (214a). And when he was cross-examined on this point Mr. Shinagel said that "the problem in an exercise like this is that <u>the common class does not deserve anything,</u> but you have to preserve it, to keep it, because the common preserves your structure and your shareholder body ...." (239a). (Emphasis supplied.)

Since the Court failed to comply with Section 515 of the Pennsylvania Business Corporation Law and the case law interpreting it in valuing Curtis in a liquidation context rather than on a going concern basis, and since the Court failed to weigh net asset value and actual market value in its fair value analysis and also failed to arrive at a mathematical determination of investment value, all contrary to the valuation requirements of Pennsylvania law as set forth in In re Watt & Shand, supra, the present award of $188,400 for Gruss' stock must be vacated.

POINT X

THE VALUATION OF $188,400 IS NOT SUPPORTED BY THE RECORD.

Disregarding the question of whether the Court's fair value analysis complies with the valuation requirements of Pennsylvania law, the analysis itself is unsound and is not supported by the record for several reasons.

First, there is no evidence in the record which warrants a finding that Curtis could avoid bankruptcy or liquidation until at least October 1, 1986. Shinagel testified that Curtis was worth $1,000,000 on September 13, 1972, but he then qualified his opinion by stating that "the company was a totally

speculative medium", that "one million dollars is simply the speculative value of Mr. SerVaas", and that without a plan of recapitalization "the company is dead" (203a, 207a-209a).[4] In addition, during the cross-examination of Shinagel, the following exchange took place:

> "Mr. Fuchs: When you were referring to a receiver buying the company for a million dollars, were you referring to a receiver buying it for a million dollars with the debt involved in the company, that is, the bonds and so forth?
>
> Mr. Shinagel: That's right. But I also in my mind made the assumption that the receiver had the intention and also had the personal conviction that the debt [the debentures] could be looked over, <u>because the debt is a stranglehold</u>." (Emphasis supplied.) (241a)

Similarly, while Anreder indicated that he thought "that the company could continue as a going conern", he did not testify as to how long he believed Curtis could stay in business and he admitted that "some sort of recapitalization was preferable to give [Curtis] a lot more flexibility than [it] had" (157a).

A second defect in the Court's conclusion that Curtis

---

4 See note 3, <u>supra</u>.

could stay in business until October 1, 1986 is that this is inconsistent with some of its other findings. Only two paragraphs later, for example, the Court observed that Curtis had only a 25% possibility of survival to October 1, 1986 and full payment of the redemption value of the Preferred Stock with arrearages, something which implies that Curtis' chances of even surviving to that date are far less than assured. Furthermore, in that same paragraph the Court described "failure, dissolution or bankruptcy of this speculative enterprise" as a "foreseeable contingency" (283a). In view of these recognized uncertainties and in view of the testimony referred to in the preceding paragraph, the Court had no basis for its key factual finding that "[t]he entire record justifies a conclusion that but for the recapitalization, [Curtis] could have continued in business at least until October 1, 1986 when an act of default would most likely have occurred with respect to the debentures" (282a).

A third problem with the Court's valuation analysis is its conclusion that Curtis had a 25% likelihood of full payment to Gruss for his stock on or shortly after October 1, 1986. This conclusion is clearly arbitrary. What evidence exists to support it? Why not conclude that Curtis had a 20% chance? or

10%? or 30%? Every percentage point found by the Court translates into approximately $7,500 of damages. On what evidentiary basis can the Court justify its specific conclusion herein? Can the Court allocate a certain number of points to the executive ability of Mr. SerVaas? How many percentage points can be attributed to the possibility that The Saturday Evening Post, which was trying to be revived after its financial failure, would be successful? The point to be made herein is that each and every one of the factors considered by the Court is purely speculative and impossible to pinpoint on a dollar or percentage basis. Accordingly, the entire valuation approach must fail as being conjectural and without foundation.[5]

The Court is unclear whether the payment to Gruss would

---

5 The only significance to be found in this 25% figure is the fact that it conveniently brings the Court's analysis in line with Anreder's testimony. Had the Court chosen any other percentage, it would have been unable to support or adopt Gruss' figure. With all due respect to the Court below, it must be stated that the entire opinion, especially that portion dealing with damages, smacks of either a preconceived notion that Curtis remains a corporate giant (which it most assuredly is not, as witnessed by the proxy material [317a] and the 1973 Annual Report [410a], as well as voluminous uncontradicted testimony), or a desire by the Court to punish Curtis or its Pennsylvania counsel for their conduct in this matter. Whatever the feelings of the Court may have been, it had no right to go beyond the valuation that would have been found by the Pennsylvania Court.

occur inside or outside of a liquidation context, but in either case the correctness of its 25% conclusion is dubious. If Curtis were liquidated, then it is most unlikely that Gruss would receive full payment since liquidation implies that Curtis would not have the resources to pay off both the debentures and the Preferred Stock, with interest and dividend arrearages. This is particularly true when it is considered that Curtis is required to repurchase the Preferred Stock for $65 per share plus all accumulated fixed dividends and all unearned contingent dividends <u>only</u> in the event of bankruptcy, insolvency or the voluntary or involuntary dissolution of Curtis (365a). Consequently, if Curtis had sufficient funds to satisfy the debentures including interest thereon on October 1, 1986, it is highly doubtful that it would liquidate at that time. Thus, the holders of the Preferred Stock might well not receive anything except increased dividend arrearages. On the other hand, if Curtis could not satisfy the debentures with interest on October 1, 1986, liquidation would probably follow, but there would be nothing available for the Preferred Stock.

A few words of explanation should be interjected at this point. We have assumed, when the Court stated that Curtis "had a 25% likelihood of survival and full payment", that

it was referring to full payment of both the debentures and the Preferred Stock, with interest and dividend arrearages, although this is not entirely clear from the language of the opinion. Otherwise, the fact that the Preferred Stock had a redemption price and dividend arrearages in the amount of $134.75 on October 1, 1986 would be meaningless and a discounted present value based on such an amount would be of no value in determining the fair value of Gruss' stock on September 13, 1972, since there is no evidence in the record with respect to if, when and in what amount dividends would be paid on the Preferred Stock after 1986. In any event, the total as of October 1, 1986 of the redemption price of the Preferred Stock in liquidation plus dividend arrearages could not by itself establish fair value, just as the total as of September 13, 1972 is not the test for fair value on that date. Consequently, it must be assumed that when the Court spoke of the 25% likelihood of full payment on October 1, 1986, it was referring to both the debentures and Preferred Stock in a liquidation context. In addition, the redemption price is not $65 a share outside of liquidation and it is unlikely that the Preferred Stock would be redeemed unless this was mandatory in view of its relatively small dividend.

To summarize this point, if a liquidation occurs on

October 1, 1986, there will be no funds available for distribution to the holders of the Preferred Stock. If a liquidation is unnecessary, however, there is no basis to believe that the Preferred Stock will be redeemed on or about that date or even that dividends will be paid thereon. Furthermore, any hypothesizing in this regard would be wildly speculative and would be clearly unacceptable as a determinant of fair value as of September 13, 1972 under Pennsylvania law.

The fourth and perhaps the most telling practical difficulty with the Court's valuation analysis is that, when considered on a mathematical or statistical basis, it is prima facie unreasonable. To pay off the debentures on October 1, 1986 would require $7,485,000 to cover the principal and $8,981,000 to cover the interest[6] for a total of $16,466,000. If the Preferred Stock also is redeemed on October 1, 1986, with dividend arrearages paid in full, this would cost an additional $45,070,000 which is determined by multiplying the per share liquidation value of $134.75, as found by the Court, times 334,470 shares. This total payment of $61,536,000 would require average net earnings or cash flow over the fourteen year period (September 13, 1972 to

---

6 See notes 1 and 2, *supra.*

October 1, 1986) of approximately $4,395,000. When these requirements are viewed in the context that Curtis had no earnings for nine of the ten years prior to the proposed recapitalization (and its net income of $.31 per share in 1971 was due to an $.88 per share extraordinary item (320a, 338a), had almost no working capital (320a, 370a-371a), was involved in the highly competitive and risky magazine industry (351a-354a), and was involved in significant and extensive litigation which in the opinion of management could have a material adverse effect upon Curtis' financial condition (354a-356a), then it would seem self-evident that Curtis could not possibly meet these requirements absent some radical and substantial changes in its business operations which were not contemplated and to which no one testified. It simply defies logic to believe that Curtis could, without such changes, transform itself from a company with a consistent net income loss to a company with an annual profit or cash flow of the $4,395,000 which would be required both to pay off the debentures and redeem the Preferred Stock on October 1, 1986.

In this connection, it should be noted that Anreder never suggested in his testimony that Curtis could accomplish this kind of profit or cash flow. Instead, the sum and substance

of his testimony was that Curtis was on a break-even basis so long as interest on the debentures was not paid (157a); that he thought there were indications that Curtis was going to increase the frequency of The Saturday Evening Post and that management could keep Curtis "more or less going" until this magazine "took off" (157a-158a); that Curtis had certain royalty rights in minerals in Timmins, Ontario discussed in an appraisal made for Curtis which the Court accepted as a binding admission against Curtis to the extent of $2,000,000 and which Curtis carried at nominal value on its financial statements [Curtis sold these rights in 1974 for $1,000,000, exactly half-way between the two figures (158a-160a, 163a-164a)]; and that Mr. SerVaas was a capable president who had made progress in attempting to solve some of the company's problems. While all of these factors were positive ones, they clearly did not provide a basis for the Court's implicit conclusion that Curtis stood a 25% chance of averaging $4,395,000 per year in net earnings over the next 14 years. Without that basis in the record, the Court erred in finding that Curtis "could have continued in business until at least October 1, 1986" and that Curtis "has a 25% likelihood of survival and full payment".

Since the record fails to support the Court's valuation

analysis and since much of this analysis is based upon speculation about future events, the present award of $188,400 for Gruss' stock must be vacated.

POINT XI

THE FAIR VALUE OF GRUSS' STOCK ON SEPTEMBER 13, 1972 WAS $18,840.

As discussed in Point IX, the three principal methods of valuation which are used in combination to determine fair value in an appraisal proceeding pursuant to section 515 of the Pennsylvania Business Corporation Law are net asset value, actual market value and investment value. In re Watt & Shand, supra, at 292, 304 A.2d at 698. Pennsylvania law also requires that these methods be applied to determine the value of a dissenter's shares on a going concern rather than a liquidation basis on the day before a plan is voted on and without considering any appreciation or depreciation in value caused by the plan. Id. at 292, 304 A.2d at 697-98. See Lowry v. General Waterworks Corp., supra, and Austin v. City Stores (No. 1), supra. When evaluated in this manner, the fair value of Gruss' 12,560 shares of Preferred Stock on September 13, 1972 was $1.50 per share or $18,840 in the aggregate.

Taking the above methods of valuation in order, net asset value represents the claim which each share of stock has in the net assets of the corporation. "Such assets include every kind of property and value, whether realty or personalty, tangible or intangible, including good will and the corporation's value as a going concern." In re Watt & Shand, supra, at 292 n.7, 304 A.2d

at 698 n.7. While net asset valuation can sometimes lead to complex appraisal problems, such difficulties do not exist in the present case because Curtis owned almost no real property or equipment and the bulk of its assets were cash, accounts receivable and prepaid expenses for which book value is a fair measurement. Since Curtis' assets as of March 1, 1972 were \$2,935,000 and its liabilities amounted to \$16,066,000, there can be no question that its net asset valuation on September 13, 1975 was a negative figure.[7]

The second principal method of determining valuation recognized by Pennsylvania law is the actual market value of the stock. In In re Watt & Shand, Id. at 293 n.7, 304 A.2d at 698 n.7, the Pennsylvania Supreme Court commented that "[m]arket value refers to the price at which the stock was selling on the market prior to the action which is objected to, disregarding any change in price due to the action". Curtis' Preferred Stock was listed on

---

7 In its opinion, the Court incorrectly stated that the "book value of defendant's common shares was negative to the extent of \$13,000,000 because of accrued Preferred dividends and unaccrued unpaid debenture interest". In actual fact, this \$13,000,000 included approximately \$2,500,000 of accrued unpaid debenture interest but did not reflect any accrued Preferred dividends. See Curtis's consolidated balance sheet in its Proxy Statement, (371a). Accrued dividends on the Preferred Stock as September 13, 1972 amounted to approximately \$10,285,000 and accrued dividends on another series of Preferred Stock exceeded \$1,500,000. Consequently, Curtis' asset picture was much bleaker than the Court apparently perceived.

the Philadelphia-Baltimore-Washington Stock Exchange and was actively traded. As the Court itself stated, the highest price for which the Preferred Stock sold during 1972 and prior to the recapitalization was 4 3/4 per share. In addition, the Preferred Stock hit a 1972 low of 2 1/8 during August of that year and sold for as little as 1 3/8 during 1970. (See Defendant's Ex. D). Curtis' expert Shinagel testified that the market value of Gruss' 12,560 shares of Preferred Stock was $1.50 per share after considering the depressing effect that such a large number of shares would have on the market. While Curtis believes that $1.50 is the appropriate figure to be used for the market value of Gruss' shares, it should be evident from the actual market price of the Preferred Stock during 1972 _prior_ to any announcement of the recapitalization plan that any per share value above $4.75 is unsupportable.

In connection with market value as a method of valuation, it should be noted that Gruss' expert, Anreder, arrived at a value of $15 per share by relying on the market value of Curtis' _common_ stock and assuming a hypothetical recapitalization of its Preferred Stock into common. The Court properly rejected this approach, however, holding that a hypothetical plan was not competent evidence of value and could not be used as the basis of a theory of valuation. See _Sparkill Realty Corporation_ v. _State_,

268 N.Y. 192 (1935). Apart from the fact that a hypothetical re-capitalization is not permissible as a valuation tool, Anreder's appraisal was also irrelevant because Pennsylvania case law makes it clear that where there is an actual market price for a stock as there was here for the Preferred Stock, _that_ is the measure of its market value. In one case, for example, which involved inter alia the Preferred Stock of what a Philadelphia Common Pleas Court characterized as "a fairly closely held corporation", the Court expressly approved what the appraisers found was "the nearest approach to market value" which was to use records of sales and transfers of the Preferred Stock over-the-counter for several years prior to a merger. _Lowry_ v. _General Waterworks Corp._, _supra_, at 164. Since Curtis' Preferred Stock was actively traded in 1972 on a national stock exchange, this Court must look at its actual market price and not any other figure as one element in determining the fair value of Gruss' stock.

The third principal method of determining valuation used by Pennsylvania Courts is investment value. Investment value was defined by the Pennsylvania Supreme Court in _In re Watt & Shand_, _supra_, at 293 n.7, 304 A.2d at 698 n.7, as follows:

> "Investment Value is an estimate of present worth in light of past, present and prospective financial records of the company and is obtained by capitalizing earnings. There are

> two basic steps in the capitalization process: calculation of a representative annual earnings figure, and choice of a capitalization ratio which reflects the stability and predictability of earnings of the particular corporation".

Since Curtis had a net income loss in nine of the ten years prior to the year of recapitalization, the one exception resulting from an extraordinary item, it is clear that when measured by the above definition its investment value had to be zero or a negative number on September 13, 1972.

In an attempt to avoid this result, plaintiff's expert Anreder analyzed investment value (without categorizing it as such) from the point of view of a number of intangibles such as the quality of corporate leadership, the possible revival of The Saturday Evening Post and the existence of certain mineral royalty rights in connection with property owned by Texas Gulf Sulphur in Timmins, Canada (later sold for $1,000,000). Curtis, however, is unable to find any Pennsylvania cases where such intangibles are given weight except insofar as they may affect the capitalization ratio which is chosen. The same is true in Delaware. See e.g., Francis I. duPont & Co. v. Universal City Studios, Inc., 312 A.2d 344 (Del. Ch. 1973) (discussion of earnings value). One reason for this is the speculative nature of such intangibles, and another is the belief that if they have

existed for some time they will be reflected in actual market value and possibly in past earnings. Two examples of this in the present case are Mr. SerVaas' leadership qualities and the possible revival of The Saturday Evening Post, both of which presumably would have been known to sophisticated investors. Consequently, the Court erred in considering investment value in the context of such intangibles.

Even assuming that these considerations are appropriate under Pennsylvania law, however, at best they represent only one component of investment value and should be reflected either in the capitalization ratio or as an adjustment to an average earnings figure. In this regard, Anreder did not testify as to the magnitude of any of these intangibles except the royalty right, and he did not give any opinion with respect to whether or not Curtis could expect to make a profit in future years. When the relatively few intangibles discussed by Anreder are viewed in the context of Curtis' consistently negative earnings record, its lack of working capital, the problems of the publishing industry generally, the opinion of its independent public accountants Arthur Andersen & Co. in a report dated February 25, 1972 that "the future of [Curtis] as an operating entity is dependent upon the success of its future operations" (Proxy Statement, 369a), and the extensive and significant litigation involving Curtis,

then it is evident that the investment value of Curtis must be pegged at or close to zero.

Finally, it should be noted that Anreder's conclusion that Curtis' Preferred Stock had a fair value of $15 per share was based solely upon what he believed to be Curtis' investment value (except to the extent of his hypothetical recapitalization which the Court rejected for reasons previously discussed). Consequently, since Anreder failed to weigh this method of valuation against net asset value and actual market value, and since he analyzed investment value principally from the view of existing intangibles like corporate leadership rather than from the viewpoint of the capitalization of past and present earnings as required by Pennsylvania law, his fair value finding of $15 per share for Curtis' Preferred Stock (or $5,017,050 in the aggregate) was not made in accordance with Pennsylvania law and therefore is not credible and must be rejected by the Court.[8]

---

8 Anreder at no time explained what values he applied to what factors in order to arrive at a fair value of $15 per share for the Preferred Stock. Presumably this is why the Court made its own independent liquidation analysis rather than simply approving Anreder's analysis. The fact is that Anreder'a analysis could not be relied upon because it was too general and $15 was little more than a number pulled out of the air. See Page 139 of the trial transcript (175a) where Anreder said that "[a]fter considering all of these factors [unspecified except for Curtis' proxy statement and annual reports] .... it is my view that the shares are worth fifteen dollars a share ...". Anreder did not explain how he reached this conclusion, and most of his testimony related to his hypothetical recapitalization model which the Court rejected. Not suprisingly, that model also resulted in a fair value of $15 per share.

When the three principal methods of valuation recognized in Pennsylvania are combined, it is clear that the fair value of Gruss' stock was far less than $15 per share on September 13, 1972. Considering that the net asset value of Curtis was a negative number, that its investment value was at, near or below zero, and that the actual market value of its Preferred Stock on a national stock exchange during 1972 did not exceed 4 3/4 per share, Shinagel's opinion that the value of Gruss' stock was $1.50 per share on September 13, 1972 is in accord with the weight of the evidence and should be accepted.

CONCLUSION

1. The weight of the evidence and the application of the appropriate principles of law compel a reversal of the lower Court's judgment and a finding that Curtis did not violate Rules 14(a)-9a and 101 of the Securities Exchange Act of 1934.

2. In the alternative, the Court should direct the taking of additional testimony as contained in the affidavits submitted by Curtis upon its motion under Rules 52 and 59 FRCP.

3. If liability is affirmed, the judgment should be reversed as to damages and the Court should find damages in an amount not greater than $18,400.

Respectfully submitted,

Lee, Cash & Marks
Attorneys for Defendant-
Appellant

On the Brief:
Theodore L. Marks

A 202 Affidavit of Personal Service of Papers

LUTZ APPELLATE PRINTERS, INC.

UNITED STATES COURT OF APPELAL
FOR THE SECOND CIRCUIT

Index No.

OSCAR GRUSS & SON
Plaintiff- Appellees

- against -

CURTIS PUBLISHING CO.

Defendant- Appelant

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK ss.:

I, Victor Ortega, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at 1027 Avenue St. John, Bronx, New York

That on the 24th day of November 1975 at 122 East 42nd Street

deponent served the annexed Brief upon

Kass, Goodkind, Wechsler & Gerstien

the Attorneys in this action by delivering 3 true copys thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Attorney(s) herein,

Sworn to before me, this 24th
day of November 1975

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977

Victor Ortega

VICTOR ORTEGA